JD(SF)–26–11
Phoenix, Arizona

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES – SAN FRANCISCO BRANCH OFFICE

PRAXAIR DISTRIBUTION, INC.

and Case 28-CA-23266

PABLO RIVERA, an Individual

William Mabry, Atty., for the
Acting General Counsel.

Frederick Miner, Atty. (*Littler Mendelson*),
for the Respondent.

DECISION

Statement of the Case

WILLIAM L. SCHMIDT, Administrative Law Judge. I heard this case at Phoenix, Arizona, on April 26, 2011. Pablo Rivera, an individual, filed the underlying charge on November 17, 2010,[1] alleging that his employer, Praxair Distribution, Inc. (Praxair, Company or Respondent), violated Section 8(a)(1) and (4) of the National Labor Relations Act (Act). The Acting Regional Director for Region 28 of the National Labor Relations Board (NLRB or Board) issued the original complaint on February 28, 2011 alleging that Respondent violated Section 8(a)(1) of the Act. On April 8, 2011, the Regional Director amended the complaint to add a further allegation. Respondent filed timely answers to the original complaint and the amendment to the complaint denying that it engaged in the unfair labor practices alleged.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the Acting General Counsel and Respondent, I make the following

Findings of Fact

I. Jurisdiction

Respondent, a Delaware corporation with an office and place of business located in Phoenix, Arizona (Respondent's facility) has been engaged in the retail sale, storage, and packaging of gases, including oxygen and helium. During the 12-month period ending November 17, 2010, the Respondent, in conducting its business operations, derived gross revenues in excess of $500,000; and during the same period of time, it also purchased and received at its Phoenix, Arizona facility goods valued in excess of $50,000 directly from points located outside the State of Arizona. Accordingly, I find that Respondent meets the Board's

[1] All dates refer to the 2010 calendar year unless shown otherwise.

retail industry discretionary standard and that it would effectuate the policies of the Act for the Board to assert its statutory jurisdiction to resolve this labor dispute.

II. Alleged Unfair Labor Practices

A. Relevant Facts

1. Introduction

The complaint alleges that the Charging Party, Pablo Rivera, engaged in protected concerted activity in connection with his complaints to management about his negative interactions with Gary Kallias, a fellow employee as well as about a safety violation. The Acting General Counsel's complaint alleges that Respondent interrogated its employees about their concerted activities; promulgated an overly-broad and discriminatory rule prohibiting its employees from discussing their concerted activities with others; threatened its employees with unspecified reprisals because they engaged in concerted activities; and denied Rivera's request to be represented by another employee during an interview which he reasonably believed would result in disciplinary action being taken against him. All such conduct, the complaint alleges, violates Section 8(a)(1).

The Respondent denies the commission of any unfair labor practices. Respondent argues that Rivera's claims that Respondent violated the Act lack merit. In effect, Respondent asserts that it did nothing more than thoroughly investigate the claims that two feuding employees had made to management. Further, the Respondent contends that the action taken against Rivera was unrelated to any protected concerted activities in which he may have been engaged. The Respondent denies that any of its actions were discriminatory or were in any way intended to interfere with its employees' right to engage in Section 7 activity.

2. The Prior Case

The Acting General Counsel believes that Rivera's activities in a prior proceeding (Case 28-CA-22806) are relevant and pertinent to this current case. The complaint was based on Respondent's actions following the filing of a report detailing several employee complaints, submitted by Rivera and his coworker, Abram P. Tarango. Judge Gregory Z. Meyerson conducted a 4-day hearing in that case and issued a decision (JD(SF)-33-10) on August 4, 2010, dismissing the most serious allegations contained in that complaint. Below is my summary of Judge Meyerson's findings in that decision.

Prior to his discharge, Tarango had worked 19 years for the Company. Rivera had worked 14 years at the time of the prior hearing. Both were canister fillers; Tarango had become the Company's lead canister filler. In the years preceding the prior NLRB charge, both men had accumulated a number workplace concerns regarding Respondent's Phoenix, Arizona operation. In July 2009 the men began collectively discussing their concerns with what they perceived to be unsafe working conditions, sexual harassment, improper conduct of certain supervisors, and other matters relating to wages, hours, and working conditions at the Phoenix facility. The two men jointly met with Dave Schmidt, the Phoenix plant manager, to voice some of their complaints but left the meeting unsatisfied with the response they received.

Frustrated with Schmidt's reaction, Rivera and Tarango, assisted by their wives, prepared a 12-page report detailing their concerns and sent it to Respondent's corporate management on October 20, 2009. They titled their report "Violations: Business Integrity, Safety, EEOC, and Human Rights" and attached a cover letter signed by each of them. Their

detailed report listed a multitude of complaints and supporting facts, including the following: that employees were forced to falsify pressure logs; the equipment used to fill gas cylinders was in disrepair; supervisors used cell phones while driving forklifts and other vehicles around the work area; the downloading games and pornography on company computers; the use of a "demanding tone of voice and despotic and authoritarian attitude" by supervisors; the possible gang connections of employees; the violations of various Federal statutes; the release of a misbranded product to a customer in 2005; filling cylinders without properly conducting required tests; and the failure of managers and supervisors to wear safety gear.

Based on the report, and after many communications between Rivera, his wife, and corporate management, Respondent began an investigation into the complaints.[2] Upon finding out about this appeal to upper management, Schmidt questioned Rivera about his involvement as well as the involvement of his wife, and their reason for participating. Rivera asked him to respect his privacy regarding the matter. Following Rivera's meeting with Schmidt, Rivera alleged that his floor supervisor, Jemal Norwood, began maintaining surveillance of him during his shifts at the plant.

On or about October 26 or 27, Respondent sent Carson Mellott, its human resources manager, and Sean Covert, a corporate security manager, to the Phoenix plant precisely to conduct the investigation into the report's allegations. During the investigation Mellott and Covert met with Rivera and Tarango in separate sessions. Both Rivera and Tarango protested being interviewed outside the presence of the other. However, both men reluctantly agreed after the managers explained the need for such procedures based on privacy concerns, denied the requests, and insisted that the interviews must be conducted separately.

The interviews sought to gather more information about the concerns enumerated in the October 20 report. During Tarango's interview he admitted to falsifying documents regarding the settle pressure test readings on several of Respondent's canisters. Tarango reported that he only falsified the records at the direction of fellow employee Bill Freidlander. However, Respondent's investigation found, and the administrative law judge's decision concurred, that Freidlander was not Tarango's supervisor or superior.[3]

In Rivera's interview he focused on allegations against Schmidt such as the misbranding of products.[4] Rivera claimed that he could prove the actions through records removed from the plant. Mellott then reminded Rivera that removing documents from work violated company policy, and questioned him as to why he waited so long to report such violations. Rivera acknowledged that he understood the company's policy regarding document removal. In addition to Rivera and Tarango, the investigating officials also interviewed several other employees implicated in this report.

After the onsite investigation in late October, Rivera and Tarango faxed a follow up report on November 8, 2009 to corporate management including Covert, Bogard, Jeff Gage, associate director of physical security, and Bill Woods, director of safety. They titled this four

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[2] Several of Rivera's managers including Dave Schmidt, Eddie Davis, Steve Bogard, and Sean Covert reported frequent and persistent phone contact with Rivera's wife, Ana Rivera.

[3] The General Counsel failed to prove either primary or secondary indicia of Freidlander's supervisory authority.

[4] By this Rivera meant that Schmidt had intentionally removed the labels on cylinders from one type of gas and replaced them with labels for a different type of gas, in order to show nonmedical gas as being of medical grade.

page follow up report "Annex to Previous Report." The document primarily alleged misconduct by plant manager Schmidt.[5] Covert responded to the additional report via email on November 11, 2009. This email informed both Rivera and Tarango that Respondent had looked into the new claims upon receipt of their second report and that both investigations were considered complete and currently under review with upper level management. Additionally, he requested that the men refrain from further contact unless they had new information to communicate, in which case they should address him directly. On November 12, Mellott completed his close-out report that concluded most of the expressed concerns were unsubstantiated and lacked merit.

As a result of the interviews, on November 20, 2009 Respondent fired Tarango for the falsification of records, despite his mistaken belief that reporting the falsification exempted him from punishment based on a whistleblower law. Additionally, after the discharge of Tarango, Rivera, who is the next most senior member of the cylinder filling team, was not promoted to lead cylinder filler and received a written warning not to remove documents again.[6] Both men cited these actions as a response to the October 20th report. However, Respondent supported the actions based on company policy and the lack of need for a lead canister filler.[7]

On November 24, 2009, following the actions taken by Respondent regarding the October 20 report, Rivera's wife Ana Rivera (Ana) called Covert to express concern about the treatment of her husband after submitting the report. Covert attempted to explain that he could not speak with her because his wife was in labor and he was attending to her at the hospital. Ana congratulated him, but insisted that he call her husband at work because other employees were retaliating against him for filing the October 2009 report. According to Mrs. Rivera, Covert used condescending tone of voice and said something to the effect that her husband should be happy that he had a job, and he should "stop reporting things, to stop going around inspecting things, because [Covert] was the inspector, [her husband] was not." Further, he warned her that if her husband did not do so, he "might be in trouble, and that he should confine himself to doing his job and only his job." Covert then allegedly ended his conversation by telling Ana that her husband should call him on Monday, after Thanksgiving.

Judge Meyerson determined that Respondent did not violate the Act through its conduct in response to this report. Although the Judge found that the men had engaged in protected concerted activity, he concluded that the General Counsel failed to prove that Respondent's subsequent adverse actions were substantially motivated by that activity. Moreover, as to Tarango's discharge and the denial of a promotion and more desirable work to Rivera, the Judge found that the General Counsel failed to prove a prima facie case that the protected concerted activity was a "motivating factor" in Respondent's decision. Additionally, Respondent rebutted any evidence offered by General Counsel with a legitimate business justification for

[5] The allegations suggested that Schmidt ignored a fire alarm that was engaged and resulted in the Respondent's work force leaving the plant, with the exception of Schmidt. Further, it was claimed that when Schmidt did finally exit the facility, he was not wearing his personal protection equipment (PPE).

[6] Rivera felt that the position of lead canister filler offered more desirable work based on the ability to work inside in the climate controlled building.

[7] Respondent no longer required a lead canister filler because prior to the submission of the report it hired a new production manager, Jemal Norwood (Norwood), and Norwood fulfilled many of the duties performed by Tarango. Additionally, Respondent explained Tarango's position of lead canister filler as a means for the company to reward him with slightly higher compensation based on his seniority, since no higher positions in his area existed.

discharging Tarango, based on the company policy against falsifying documents. Furthermore, Judge Meyerson recommended the dismissal of the additional allegations regarding conversations with Schmidt, Mellott, Davis, and Covert, as well as allegations of surveillance and allegations regarding written communications based on the legitimate business justification for taking such action and the lack of evidence of adverse motive.

However, Judge Meyerson found merit to the allegation concerning the November 24 conversation between Ana and Covert. In that instance Judge Meyerson determined that the conversation constituted a threat to employees of unspecified reprisals, discharge, closer supervision, conditioned continued employment on relinquishing Section 7 rights, all as a result of their having engaged in concerted activities; and promulgated an overly-broad and discriminatory rule prohibiting employees from engaging in concerted activity; and created an impression among its employees that their concerted activities were under surveillance. As a result he ordered Respondent to cease and desist from the unlawful actions and post a notice to employees acknowledging that Respondent would respect their rights. Presently, the case is pending before the Board on exceptions.

3. Facts Relevant to the Current Dispute

In August 2010,[8] shortly after Judge Meyerson's decision, Rivera began complaining to his supervisors, Norwood and Schmidt, about his fellow employee, Gary Kallias. No evidence shows that Rivera sought to enlist the support of other employees at anytime to deal with the developing antagonism between himself and Kallias.

Rivera had a variety of complaints about Kallias. He claimed that Kallias locked him out of the lunchroom and ignored his requests to be let in. Subsequently, on September 7th, Rivera alleged that Kallias disconnected his CO_2 line, thereby interfering with Rivera's production. In September, a new employee told Rivera that Kallias spoken negatively with him about Rivera, mentioning things such as how difficult Rivera was to work with. In addition, Rivera left his helmet in the bathroom around this time and, when he returned for it, someone had filled it with water. Rivera characterized this incident as a safety concern. All of these issues were reported to either Norwood or Schmidt. As a result of the reports by Rivera, Schmidt assigned Norwood to monitor the usage of the CO_2 pump.

On September 28, Mellott made a visit to the Phoenix, Arizona plant. Mellott's responsibilities included hiring, training, discipline, and investigation. During his visit Mellott spoke with Rivera. Rivera asserts that Mellott told him "[T]hings are as they are" and Rivera understood this to be a reference to Respondent winning the prior case pertaining to the October 2009 report. Mellott generally corroborates this interaction, but he characterizes it as simply communicating that while the Company may have disagreed with Rivera during the previous proceeding, it simply wanted to move forward. At this time Rivera did not mention his complaints regarding Kallias. Rivera stated that he did not mention the incidents because he had already reported each of them to one or both of his supervisors.

As time passed, Rivera had more difficulties with Kallias. On October 22, Rivera noticed Kallias mocking his habit of whistling. On October 28, Kallias grabbed Rivera's hand to prevent him from reaching for a doughnut from a box that had been set out for the employees in the

[8] If not shown otherwise, dates pertinent to this case refer to the 2010 calendar year.

lunchroom. At an unspecified time Kallias began parking in Rivera's parking space.[9] The parking lot created further issues for Rivera when Kallias allegedly opened his car door quickly as Rivera attempted to move into a parking space. Rivera claims that this incident almost resulted in an accident and such behavior presents a valid safety concern. Lastly, Rivera reported that Kallias purposely removed a dolly that he brought to his station for his use.[10]

On November 4, Mellott visited the Phoenix facility. This visit partially involved complaints to Mellott by Kallias on November 1 about Rivera. Kallias indicated that he was "[F]rustrated with Pablo" and "[T]hat Pablo was . . . doing things to people and trying to get people in trouble." Kallias alleged that Rivera whistled to annoy people, complained when others used equipment that he wanted to use, became angry when someone parked in the spot that he considered his, and that he had pushed Kallias. Shawn Hernandez, another employee, supposedly corroborated Kallias' account of the pushing incident. When Mellott told Schmidt about Kallias' claims, Schmidt informed Mellott about Rivera's corresponding complaints.

Based on the complaints he received and had heard about, Mellott conducted two interviews after arriving at the Phoenix facility on the morning of November 4. Both interviews took place in the distribution center office, aka, Sam Castillo's office. He first questioned Kallias for about 30 minutes. After that, Schmidt brought Rivera to the office to speak with Mellott. Schmidt claims that Rivera never made a request of any kind for the presence of a coworker at the meeting.

During the interview, Mellott first asked Rivera to verbally inform him about his recent issues at the plant. Rivera detailed the previously reported issues pertaining to Kallias with Mellott and Schmidt for approximately an hour. Rivera said that both Mellott and Schmidt took notes as he spoke. Occasionally Mellott interrupted Rivera to ask a question, or requested him to move on to another subject. The most notable interruption reported by Rivera occurred when Mellott accused him of lying because he had said nothing about any of the incidents when the two last spoke on September 28.

At the conclusion of his report about Kallias, Mellott asked Rivera if he bumped Kallias in the bathroom during the past week. Rivera denied this accusation. Mellott then requested that Rivera put his claims in writing. At first, Rivera refused and asked to make a phone call.[11] Mellott denied this request and said that if Rivera refused to write out his complaints he would make a note of that and report that Rivera refused to cooperate.[12] Schmidt corroborated these facts and testified that Mellott told Rivera he could not make a call because he wanted to get the information in Rivera's own words and he had to leave soon to catch a plane. After protesting, Rivera acquiesced and began writing the report, fearful that a negative report that he had been uncooperative could result in his termination.

Mellott acknowledged that Rivera appeared hesitant to give a written statement, but both he and Schmidt credibly denied Rivera's claim that he only did so after Mellott physically barred

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[9] Although spaces are not assigned and no company policy exists regarding this issue, Rivera claimed employees always respected each other's parking spot selections.

[10] Respondent does not assign dollies, however Rivera considered this a personal affront because there were several dollies at Kallias' station that he could have used.

[11] Rivera admitted that he wanted to call his wife to for her opinion as to whether Mellott could require him to write out his complaints.

[12] Rivera also claimed that Mellott barred him from leaving the room at this time by blocking the door with his body. I do not credit that claim.

him from leaving, stating "[Y]ou are not going anywhere." Once Rivera began the report, Schmidt left the meeting. Rivera likened this experience to the events surrounding the October 2009 complaint.

While Rivera recorded his complaints, Mellott frequently interrupted him to check his progress. Mellott admits making several inquiries about Rivera's progress but explained that he did so because of his flight schedule. Rivera's written complaint contains all of his allegations except the situation regarding his helmet, which he left out because he believed Mellott's refusal to listen to him about it initially amounted to a dismissal of that complaint. At the end, Rivera wrote that his report amounted to only a summary of the events made for Mellott. Although he admits that Mellott did not require him to limit or restrict his written account in any way, he made no reference in the report about being unable to leave or to place a telephone call.

After handing over his written account to Mellott, Rivera asked for a copy of it. Mellott denied the request. Rivera claims that even after he asserted his right to receive a copy of the report, Mellott loudly and affirmatively denied this request stating that the memorandum was Praxair property, and that he required approval to issue him a copy. Mellott agrees that he initially denied Rivera's request for a copy but denies the forceful nature of his refusal attributed to him by Rivera. Instead he claims that he told Rivera he could have a copy if it was approved. Both parties agree that the meeting and subsequent recording session lasted approximately 1-1/2 to 2 hours. Several hours after the meeting Schmidt delivered a copy of Rivera's written report to Rivera and informed him that Mellott had left.

Rivera explained that following the interview he did not attempt to report Mellott's treatment of him during the meeting or his demand for a written record. Based on his prior experience with the Company's "hotline," he believed that any such internal option would not serve to address his complaints because of their connection to management. However, Rivera submitted another report to Schmidt about a further incident with Kallias.

In response to the November 4, 2010 meeting, Respondent sent Rivera a letter on December 8, 2010. The letter contained a summary of Rivera's complaints, excluding the helmet issue and Kallias' conversation with a temporary worker regarding Rivera's attitude. Additionally, the letter made suggestions for improvement of the atmosphere in the plant.

B. *Analysis and conclusions*

The Acting General Counsel alleges in this case that Respondent has violated Section 8(a)(1) of the Act. That provision makes it an unfair labor practice for an employer to interfere with, restrain, or coerce employees who exercise the rights guaranteed them by Section 7. The relevant portion of that section provides that employees have the right to "self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other *concerted activities* for the purpose of collective bargaining or *other mutual aid or protection*." [Emphasis added]

The *Meyers* litigation[13] produced the Board's current view about the reach of the the statutory term "concerted activities." In *Meyers I*, the Board explained that "concerted activities" as used in Section 7 requires that an employee's activity must be engaged in with or on the

[13] *Meyers Industries*, 268 NLRB 493 (1984) (*Meyers I*); remanded sub nom. *Prill v. NLRB*, 755 F.2d 941 (D.C. Cir. 1985), cert. denied 474 U.S. 948 (1985); *Meyers Industries*, 281 NLRB 882 (1986) (*Meyers II*), affd. sub nom. *Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987).

authority of other employees, and not solely by and on behalf of an individual employee. 268 NLRB 497. In *Meyers II,* the Board conceded that that concerted activity could also encompass "individual employee activity so long as the employee acts as a representative of at least one other employee" 281 NLRB 885. Included within its *Meyers I* definition, the Board held, are those instances where an individual employee seeks to initiate or to induce or to prepare for group action, as well as the conduct of an individual employee who brings "truly group complaints" to the attention of management. Id. at 887.

Before turning to the specific complaint allegations, some preliminary observations are in order. Although the *Meyers* test was clearly met in the prior case, I have concluded that none of Rivera's activities in the current case met the *Meyers* standard. Put another way, all of Rivera's complaints about Kallias' conduct are personal in nature. They lack the quality that would permit a rational conclusion that they related to or involved other employees. There has been no showing that Kallias bullied everyone, or even a limited number of employees. Instead, he focused his perturbing, petty behavior solely at Rivera. Rivera, in turn, made no known effort to enlist any other employee to assist in putting an end to Kallias' annoying conduct. Instead, he complained only to management. My findings as to the specific complaint allegations follow.

1. The alleged interrogation

Complaint paragraph 4(a)(1) alleges that Mellott "interrogated [Praxair] employees about their concerted activities" on November 4.

The Acting General Counsel asserts that Mellott interrogated River during their November 4 meeting (1) by demanding "that Rivera submit and repeat his complaints in a written report," and (2) by seeking the identity of the person Rivera wanted to call after Mellott requested that he set out his complaints in writing. Respondent contends that the Acting General Counsel failed to meet his burden of proof regarding the allegations that Mellott interrogated Rivera or promulgated an unlawful rule prohibiting discussion of protected concerted activities.

I agree with Respondent's contention. The AGC offered no evidence that Mellott asked any questions regarding any protected activity, or inquired as to who Rivera intended to call during the interview. Hence, there is no factual support for the Acting General Counsel's claims. In fact, as the entire session between Mellott and Rivera pertained to Rivera's personal complaints about another employee and that employee's complaints about Rivera, the vast bulk of the session involved no protected concerted activity on Rivera's part at all. And contrary to the Acting General Counsel's assertion, I find no connection between Rivera's prior protected activity in the earlier case and his conduct that led to the November 4 interview. They are entirely separate matters.

Ordinarily, unlawful interrogation involves some effort by an employer to coercively question an employee concerning protected subjects or employee conduct. *See Rossmore House*, 269 NLRB 1176, 1178 n. 20 (1984), *enfd.* 760 F.2d 1006 (9th Cir. 1985). Mellott's request that Rivera put his personal complaints in writing does not amount to coercive questioning concerning any protected subject. Accordingly, I will recommend that this allegation be dismissed.

2. The alleged promulgation of a rule prohibiting protected concerted activity

Complaint paragraph 4(a)(2) alleges that Mellott "promulgated an overly-broad and discriminatory rule prohibiting its employees from discussing their concerted activities with others" on November 4.

The Acting General Counsel contends that "Mellott's directive to Rivera [during the November 4 interview] that he was not going to call anyone amounts to a rule prohibiting Rivera from calling other employees for mutual aid and protection." Respondent contends that Mellott did not violate Rivera's protected Section 7 rights by simply denying Rivera's request to call an unidentified person for an unspecified purpose.

I conclude in agreement with Respondent's contention that this allegation also lacks merit. At the outset, no evidence supports a finding that Rivera ever intended to call another employee or ever disclosed to Mellott that he wanted to call another employee. Moreover, I find that the Mellott's denial of Rivera's vague request to make a phone call during the interview did not amount to a "rule" of any kind. Instead, it amounted to nothing more than a specific, declarative response to a specific question. The evidence concerning this incident considered in its entirety establishes that the response was never intended to have an application beyond the immediate question that Rivera asked.

Again, there is no factual support for the claims made in the Acting General Counsel's complaint and brief. No evidence supports a rational finding that Mellott, acting on behalf of Respondent, promulgated a rule banning employees from calling coworkers in the circumstances similar to those found here or from engaging in any other form of protected concerted activity. Accordingly, I will recommend that this allegation be dismissed.

3. The alleged threats

Complaint paragraph 4(a)(3) alleges that the Company threatened its employees with unspecified reprisals because they engaged in concerted activities.

The Acting General Counsel argues that Mellott's statement to Rivera when denying him a copy of his written report at the end of the November 4 meeting on the ground that he needed "to check something, I want to be sure that I'm not involved in this and that later I will get a surprise because (a lawyer) will be involved in this or you contact one of the agencies" amounts to a threat of some unspecified reprisal. Respondent argues that Mellott's statement to Rivera at that point in the interview fails to support a threat allegation. I agree.

Rivera admitted that he was given a copy of his statement later in the day. Mellott's statement amounts to nothing more than an expression of caution on his part likely based on his experience with the prior proceeding. For this reason, I am unable to conclude that the statement he made when refusing Rivera a copy of his statement at the end of the interview amounts to either an explicit or implicit threat. Accordingly, I will recommend the dismissal of this allegation.

4. Denial of representation during an investigatory interview

Complaint paragraph 4(a)(4) alleges that Respondent denied Rivera's request to be represented by another employee during an interview for which he had reasonable cause to believe that disciplinary action would be taken against him.

The Acting General Counsel argues that by denying Rivera's request to make a phone call, Respondent "denied any possibility" that Rivera could request a coworker to be present during the November 4 investigatory interview. Respondent lists three reasons dismissing this allegation. First, unrepresented employees, such as those involved here, have no right to a *Weingarten* representative. Second, even if unrepresented employees had such a right, as they have in the past, Rivera did not properly invoke the right. And third, Mellott responded appropriately even if it is found that Rivera made a proper request for representation.

I agree with most of Respondent's arguments. Under existing case law, *Weingarten* rights do not apply to unrepresented workers such as the employees of the Praxair operation involved here. *IBM Corp*, 341 NLRB 1288 (2004).

Under prior law governing this subject, an unrepresented employee could request the assistance of a "coworker" during an investigatory interview. *Epilepsy Foundation of Northeast Ohio*, 331 NLRB 676 (2000). The right did not contemplate the presence of an outside representative. Here, Rivera made no explicit request for assistance by a coworker. Rather, when he requested to make a phone call, the key fact on which the Acting General Counsel has fashioned this allegation, he admittedly sought to speak with his wife, who is not an employee of Respondent but who played a significant role in the prior case.

For the foregoing reason, I need not engage in "what if" speculation as to whether Mellott acted properly if it could be assumed that Rivera's request to make a phone call amounted to a request for coworker representation. Accordingly, I recommend the dismissal of this allegation.

Conclusion of Law

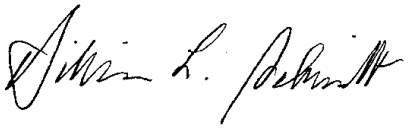
Respondent, an employer engaged in commerce within the meaning of Section 2(2), 2(6) and 2(7) of the Act, did not engage in the unfair labor practices alleged in the complaint.

On these findings of fact and conclusion of law and on the entire record, I issue the following recommended[14]

ORDER

The complaint is dismissed.

Dated, Washington, D.C. July 19, 2011



William L. Schmidt
Administrative Law Judge

[14] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.